

**UNITED STATES DISTRICT COURT  
DISTRICT OF NORTH DAKOTA, EASTERN DIVISION**

GIANT SNACKS, INC.,

Plaintiff,

v.

WILD DUTCHMAN PRODUCTS, INC.  
AND SOUTHERN SUN, LLC,

Defendants.

Court File No.: \_\_\_\_\_

**COMPLAINT AND  
JURY DEMAND**

Giant Snacks, Inc., for its Complaint against Wild Dutchman Products, Inc. and Southern Sun, LLC under the Lanham Act and state law, alleges as follows:

**Wild Dutchman’s False “Half the Salt” Advertising Claim**

1. Wild Dutchman sunflower seeds are advertised as having “Half the salt. All the flavor.” of all or most other sunflower seeds.
2. The claim that Wild Dutchman sunflower seeds have “Half the salt. All the flavor.” is false. For example, testing shows that Wild Dutchman sunflower seeds do not have half the salt of Giants sunflower seeds, as shown below.

| Giants Original   | Giants Kettle Roast Original  | Wild Dutchman regular   |
|---|---|---|
|  |  |  |
| 2745 mg sodium/100 g  | 1154 mg sodium/100 g  | 2332 mg sodium/100 g  |

## **PARTIES**

3. Plaintiff Giant Snacks, Inc. (“Plaintiff” or “Giants”) is a North Dakota corporation, with its principal place of business located at 17950 ND-13, Wahpeton, North Dakota 58074.

4. Giants is a family-owned and operated business that started in North Dakota more than two decades ago. Giants works closely with hometown farmers to produce high-quality seeds and nuts—with a primary focus on sunflower seeds—and has been selling snack products throughout the United States since 1995.

5. Defendant Wild Dutchman Products, Inc. (“Wild Dutchman”) is a South Dakota corporation, with its principal place of business located at 11440 302nd Avenue, Mound City, South Dakota 57646.

6. Wild Dutchman grows, markets, and sells sunflower seeds.

7. Wild Dutchman accepts orders via telephone and email and operates a website that markets Wild Dutchman sunflower seeds online at [www.wild-dutchman.com](http://www.wild-dutchman.com).

8. Wild Dutchman also sells Wild Dutchman sunflower seeds through retail stores in Minnesota, North Dakota, and South Dakota, as confirmed by its website identifying specific stores in those states selling Wild Dutchman sunflower seeds.

9. Defendant Southern Sun, LLC (“Southern Sun”) is a South Dakota limited liability company, with its principal place of business located at 850 21st Street SW, Huron, South Dakota 57350.

10. Upon information and belief, Southern Sun is in partnership with Wild Dutchman to process, market, and sell Wild Dutchman sunflower seeds. Southern Sun markets Wild Dutchman sunflower seeds online at [www.southernsunsd.com](http://www.southernsunsd.com) to consumers throughout the United States.

### **JURISDICTION AND VENUE**

11. This is an action for false advertising pursuant to Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a)(1)(B), and North Dakota's Unlawful Sales or Advertising Practices statute, N.D.C.C. § 51-15-02.

12. This Court has original and exclusive jurisdiction over the subject matter of this action under 28 U.S.C. §§ 1331 and 1338, in that this matter involves an action arising under the Lanham Act.

13. This Complaint also alleges pendent state law claims under North Dakota law that are so related to the federal claims under the Lanham Act that they form part of the same case and controversy under Article III of the United States Constitution, thereby making the exercise of Supplemental Jurisdiction under Title 28 U.S.C. § 1367 appropriate.

14. Venue is proper in this District under 28 U.S.C. § 1391(b)(2) because Wild Dutchman and Southern Sun (collectively, "Defendants") regularly transact business in the District of North Dakota, Defendants are subject to personal jurisdiction in this District, and a substantial part of the events giving rise to the false advertising claim occurred in this District.

## **FACTUAL BACKGROUND**

### **Sunflower Seed Purveyors and Products**

15. Giants makes and sells several varieties of sunflower seeds, including original, kettle roast original, dill pickle, salt & pepper, kettle roast dill pickle, and kettle roast cracked pepper.

16. Wild Dutchman makes and sells several varieties of sunflower seeds, including regular, cheddar dill, ranch, and flamin' bacon.

17. Giants and Wild Dutchman are direct competitors.

18. In addition to Giants and Wild Dutchman, other competitor sunflower seed brands include Bigs, Spitz, Davids, and Frito, all of which sell sunflower seed products in a variety of flavors.

19. Although sunflower seed shells are inedible, the coatings put on the shells, including salt, are edible and intended to be ingested: “the coatings impart flavor and are indisputably intended to be ingested as part of the sunflower seed eating experience.” *Lilly v. ConAgra Foods, Inc.*, 743 F.3d 662, 663, 665 (9th Cir. 2014) (holding that “the sodium content of the edible coating added to sunflower seed shells must, under federal law, be included in the nutritional information disclosed on a package of sunflower seeds”).

### **Defendants’ False “Half the Salt. All the Flavor.” Advertising Claim**

20. Upon information and belief, in or around 2014, Defendants changed the packaging for all Wild Dutchman sunflower seeds to prominently depict the claim, “Half the salt. All the flavor.” at the left-hand top of the package, as shown below.



21. Upon information and belief, Defendants sell Wild Dutchman sunflower seeds in the new packaging, which contains the “Half the salt. All the flavor.” claim, throughout the United States, including in North Dakota.

22. In retail stores, Wild Dutchman sunflower seeds and their packaging prominently displaying the “Half the salt. All the flavor.” claim are displayed next to Giants sunflower seeds, as shown below.



23. In retail stores, store displays and advertisements repeat Defendants' claim that Wild Dutchman sunflower seeds have half the salt, as shown below.



24. Wild Dutchman also claims in online advertising on its website that “WILD DUTCHMAN SEEDS HAVE LESS THAN 1/2 THE SALT & TWICE THE FLAVOR AND YOU CAN EAT THEM ALL DAY LONG WITHOUT GETTING A SORE MOUTH!!” as shown below.

Wild Dutchman Seeds  
1-605-955-3310  
The World's best tasting Sunflower seeds

Wild Dutchman Seeds  
11440 302nd Ave  
Mound City, SD 57648  
1-805-955-3310 toll free  
info@wilddutchman.com

64024 Follow us on Facebook

**The New Bench Mark for Sunflower Seeds :)**

**Prices:shipping not included**

|               |         |        |
|---------------|---------|--------|
| 2.1oz Bags    | \$0.55  | .26/oz |
| 6.5oz Bags    | \$1.20  | .18/oz |
| 13oz Bags     | \$2.35  | .18/oz |
| 3lb Bags      | \$7.20  | .15/oz |
| Special Pack. | \$32.50 |        |

9 to 10-13oz bags \$32.75

**WILD DUTCHMAN SEEDS HAVE LESS THAN 1/2 THE SALT & TWICE THE FLAVOR AND YOU CAN EAT THEM ALL DAY LONG WITHOUT GETTING A SORE MOUTH!!**

If you would like to order our seeds, they come in 6.5oz bags (\$1.20/bag) and 13oz bags (\$2.35/bag).

You can order by the case if you like. A Case (32) of 6.5oz is \$38.40 + Shipping & Handling.

A Case (34) of 13oz is \$79.90 + Shipping & Handling.

You can call us at 1-605-955-3310 or email info@wilddutchman.com with all your info.

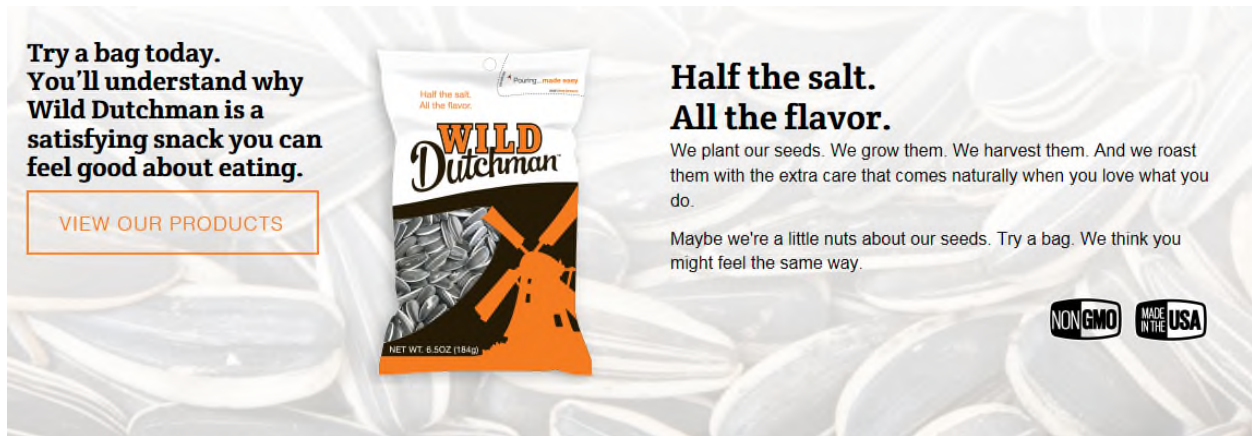
Hope to hear from you. We love to hear your comments.

**Special Package!!**  
Here is a package we can send anywhere in the US with 9 to 10-13oz. bags or 18 to 20-6.5oz bags for \$32.75

**We accept Credit Cards & Debit Cards.**

18 to 20-6.5oz bags \$32.75

25. Likewise, Southern Sun claims in online advertising on its website that Wild Dutchman sunflower seeds have “Half the salt. All the flavor.” as shown below.



26. Defendants’ claim that Wild Dutchman sunflower seeds have “Half the salt. All the flavor.” does not explicitly state the identity of the reference food to which Defendants are comparing Wild Dutchman sunflower seeds, as required for food labeling by the United States Food and Drug Administration (FDA):

A food may bear a statement that compares the level of a nutrient in the food with the level of a nutrient in a reference food. These statements shall be known as ‘relative claims’ . . . . For foods bearing relative claims: . . . *The label or labeling must state the identity of the reference food* and the percentage (or fraction) of the amount of the nutrient in the reference food by which the nutrient in the labeled food differs (e.g., ‘50 percent less fat than (reference food)’ or ‘1/3 fewer calories than (reference food))’ . . . .

21 C.F.R. § 101.13(j)(2) (emphasis added.)

27. Defendants’ “Half the salt. All the flavor.” claim necessarily implies that Wild Dutchman sunflower seeds have half the salt of all or most other sunflower seeds.

28. Upon information and belief, Defendants do not currently and have never offered an original or higher salt version of Wild Dutchman sunflower seeds.

29. Defendants intend the “Half the salt. All the flavor.” claim to compare Wild Dutchman brand sunflower seeds to all or most other sunflower seeds.

30. In an article in the National Sunflower Association magazine, one of the founders of Wild Dutchman, Wayne VanderLaan, said, “One thing that has stayed the same since day one is our recipe. Our seeds have half the salt *than other seeds*, which means you can eat them all day without getting a sore mouth.” (emphasis added).

31. In addition to falsely representing that Wild Dutchman sunflower seeds have half the salt of all or most other sunflower seeds, Defendants’ “Half the salt. All the flavor.” claim also falsely implies that all or most other sunflower seeds, including Giants sunflower seeds, which often are merchandised directly next to Wild Dutchman sunflower seeds, have twice the salt of Wild Dutchman sunflower seeds.

**Independent Testing Establishing Falsity of  
Defendants’ “Half the salt. All the flavor.” Advertising Claim**

32. In or around 2014 or 2015, Giants became aware of Wild Dutchman’s new packaging and Defendants’ claim that Wild Dutchman sunflower seeds have “Half the salt. All the flavor.”

33. To test the validity of Defendants’ “Half the salt. All the flavor.” claim, Giants hired two independent laboratories, Midwest Laboratories and Merieux NutriSciences/Silliker, Inc. (“Independent Labs”), to conduct sodium tests on

sunflower seeds sold by Defendants and Giants, as well as the following sunflower seed competitor brands: Bigs, Spitz, Davids, and Frito-Lay (“Third Party Companies”).

34. The Independent Labs tested multiple flavors in various pack sizes sold by Defendants, Giants, and Third Party Companies.

35. Each Independent Lab tested three samples of each brand and flavor in each package size.

36. Midwest Laboratories tested the sodium content of each brand and flavor of sunflower seeds in the shell.

37. Merieux NutriSciences/Silliker, Inc. tested the sodium content of each brand and flavor of sunflower seeds in the shell and also tested the sodium content of each flavor of sunflower seeds not in the shell, *i.e.*, the kernel only.

38. Whether sodium content was tested with kernels in the shell (which is appropriate given how sunflower seeds are consumed) or tested with respect to kernels only, the Wild Dutchman sunflower seeds tested did not contain half the salt of all or most other sunflower seeds tested by the Independent Labs, including those sold by Giants. For illustration, average tested amounts of salt content in regular flavors of Wild Dutchman sunflower seeds and Giants sunflower seeds are shown below.

| Brand         | Flavor and Size       | In-Shell Test                 | Kernel Only Test            |
|---------------|-----------------------|-------------------------------|-----------------------------|
| Giants        | Kettle Original 5 oz. | 1154 mg sodium/<br>100g seeds | 152mg sodium/<br>100g seeds |
|               | Original 5.75 oz.     | 2745mg sodium/<br>100g seeds  | 310mg sodium/<br>100g seeds |
|               | Original 12 oz.       | 2800mg sodium/<br>100g seeds  | 274mg sodium/<br>100g seeds |
| Wild Dutchman | Regular 6.5 oz.       | 1943mg sodium/<br>100g seeds  | 210mg sodium/<br>100g seeds |
|               | Regular 13 oz.        | 2332mg sodium/<br>100g seeds  | 285mg sodium/<br>100g seeds |
|               | Regular 3 lbs.        | 2723mg sodium/<br>100g seeds  | 313mg sodium/<br>100g seeds |

39. As shown above, some Giants sunflower seed products actually had *less* sodium than Wild Dutchman sunflower seed products. In no case did Wild Dutchman sunflowers seeds, whether tested in the shell or kernel only, have half the salt (or less) of Giants sunflower seeds.

40. Because Wild Dutchman sunflower seeds do not have “half the salt” (or less) of all or most other sunflower seeds, including Giants sunflower seeds, Defendants’ advertising claim that Wild Dutchman sunflower seeds have “Half the salt. All the flavor.” is literally false and deceptive to consumers.

41. In the alternative, if Defendants’ “Half the salt. All the flavor.” claim is not found to be literally false, the claim is misleading, particularly because Wild Dutchman sunflower seeds bearing the advertising claim are often merchandised directly next to competitor sunflower seeds, including Giants sunflower seeds.

**Count I**  
**False Advertising Under the Lanham Act, 15 U.S.C. § 1125(a)(1)(B)**

42. Plaintiff restates and realleges the foregoing paragraphs in this Complaint as though fully set forth in this Count.

43. Defendants' commercial advertising, including Wild Dutchman product packaging, the Wild Dutchman and Southern Sun websites, and advertising in retail stores, makes a literally false statement of fact about Wild Dutchman sunflower seeds—namely, that Wild Dutchman sunflower seeds have “Half the salt. All the flavor.” of all or most other sunflower seeds, including Giants sunflower seeds. This false statement also falsely implies that all or most other sunflower seeds have twice the salt of Wild Dutchman sunflower seeds.

44. In the alternative, if Defendants' advertising claim is not found to be literally false either on its face or by necessary implication, Defendants' commercial advertising makes a misleading statement of fact about Wild Dutchman sunflower seeds—namely, that Wild Dutchman sunflower seeds have “Half the salt. All the flavor.” of all or most other sunflower seeds, including Giants sunflower seeds, which is false.

45. Defendants' false or misleading statement that Wild Dutchman sunflower seeds have “Half the salt. All the flavor.” has, upon information and belief, actually deceived and has the tendency to deceive a substantial segment of consumers of sunflower seed snack products into believing that Wild Dutchman sunflower seeds have half the salt (or less) of all or most other sunflower seeds and

that all or most other competitor sunflower seeds—including Giants—have at least twice as much salt as Wild Dutchman sunflower seeds.

46. Defendants' false or misleading statement that Wild Dutchman sunflower seeds have "Half the salt. All the flavor." is material, in that the statement is likely to influence the purchasing decision of sunflower seed consumers because salt intake is a significant dietary and health concern for many consumers. In addition, a lower salt content in sunflower seeds may allow a consumer to consume more seeds without irritation to the mouth from the salt.

47. Defendants have caused the false or misleading statement that Wild Dutchman sunflower seeds have "Half the salt. All the flavor." to enter interstate commerce via retail sales in multiple states, as well as website and retail advertising.

48. As a result of Defendants' false or misleading statement that Wild Dutchman sunflower seeds have "Half the salt. All the flavor.", Giants has suffered economic injury to both its reputation and its sales, because (a) consumers have opted and will likely opt to purchase Wild Dutchman sunflower seeds instead of Giants sunflower seeds mistakenly believing Defendants' false or misleading statement, and (b) consumers have formed or will likely form the mistaken belief that Wild Dutchman sunflower seeds have half the salt or less of Giants sunflower seeds and that, conversely, Giants sunflower seeds have at least twice the salt of Wild Dutchman sunflower seeds.

49. Defendants' false or misleading statement that Wild Dutchman sunflower seeds have "Half the salt. All the flavor." constitutes willful false advertising because, upon information and belief, Defendants have no credible or competent evidence to support this statement.

50. Defendants' false or misleading statement that Wild Dutchman sunflower seeds have "Half the salt. All the flavor." is made in bad faith because Defendants have failed to explicitly identify a reference food for this comparative advertising claim, as required by FDA regulations.

51. Defendants' advertizing claim that Wild Dutchman sunflower seeds have "Half the salt. All the flavor." is a false or misleading representation of fact that misrepresents the characteristics and qualities of Defendants' sunflower seed products and Giants' sunflower seed products in violation of 15 U.S.C. § 1125(a)(1)(B).

52. Defendants' false or misleading advertising claim that Wild Dutchman sunflower seeds have "Half the salt. All the flavor." has damaged Giants and unjustly enriched Defendants.

**Count II**  
**False Advertising Under North Dakota's Unlawful Sales or**  
**Advertising Practices Statute**

53. Plaintiff restates and realleges the foregoing paragraphs in this Complaint as though fully set forth in this Count.

54. False advertising is prohibited under North Dakota's Unlawful Sales or Advertising Practices statute. *See generally* North Dakota Century Code Chapter 51-15.

55. North Dakota's Unlawful Sales or Advertising Practices statute makes false advertising unlawful:

The act, use, or employment by any person of any deceptive act or practice, fraud, false pretense, false promise, or misrepresentation, with the intent that others rely thereon in connection with the sale or advertisement of any merchandise, whether or not any person has in fact been misled, deceived, or damaged thereby, is declared to be an unlawful practice.

N.D.C.C. § 51-15-02.

56. Defendants' commercial advertising, including Wild Dutchman product packaging and the Wild Dutchman and Southern Sun websites, makes a literally false statement of fact about Wild Dutchman sunflower seeds—namely, that Wild Dutchman sunflower seeds have “Half the salt. All the flavor.” of all or most other sunflower seeds. This false statement also falsely implies that all or most other sunflower seeds have at least twice the salt of Wild Dutchman sunflower seeds.

57. In the alternative, if Defendants' advertising claim is not found to be literally false on its face or by necessary implication, Defendants' commercial advertising makes a misleading statement of fact about Wild Dutchman sunflower seeds—namely, that Wild Dutchman sunflower seeds have “Half the salt. All the flavor.” of all or most other sunflower seeds, including Giants sunflower seeds, which is false.

58. Defendants' false or misleading statement was made with the intent that consumers would rely on the statement when making purchasing decisions because salt intake is a significant dietary and health concern for many consumers. In addition, a lower salt content in sunflower seeds may allow a consumer to consume more seeds without irritation to the mouth from the salt.

59. As a result of Defendants' false or misleading statement that Wild Dutchman sunflower seeds have "Half the salt. All the flavor.", Giants has suffered and will continue to suffer economic injury to both its reputation and its sales, because (a) consumers have opted and will continue to purchase Defendants' products instead of Giants' products mistakenly believing Defendants' false or misleading statement, and (b) consumers have formed or will likely form the mistaken belief that Wild Dutchman sunflower seeds have half the salt or less of Giants sunflower seeds and that, conversely, Giants sunflower seeds have at least twice the salt of Wild Dutchman sunflower seeds. Accordingly, Giants is entitled to relief under N.D.C.C. § 51-15-09.

60. Defendants' false or misleading advertising claim has damaged Giants and unjustly enriched Defendants.

#### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiff prays for a judgment in its favor and that the Court enter an order as follows:

1. That Defendants be ordered to immediately cease using, marketing, distributing, or selling any sunflower seed products with advertising materials,

including packaging, claiming “Half the salt. All the flavor.” or otherwise claiming, expressly or impliedly, that Wild Dutchman sunflower seeds have half the salt or less of all or most other sunflower seeds, including Giants sunflower seeds;

2. That Defendants be ordered to recall any sunflower seed products with false or misleading advertising claims, including packaging claiming “Half the salt. All the flavor.”;

3. That Defendants be permanently enjoined from make false claims that its sunflower seed products contain half the salt of all or most other sunflower seeds, including Giants products;

4. That Defendants be ordered to publicly disseminate corrective advertising to remedy the false or misleading “Half the salt. All the flavor.” claim in a form and frequency acceptable to Giants and the Court;

5. That Defendants be ordered to give a report in writing, under oath, stating that Defendants have complied with the Court’s injunction and describing the steps taken to comply with the Court’s order;

6. That Giants recover Defendants’ profits, in an amount to be established at trial, from Defendants’ false or misleading claim that Wild Dutchman sunflower seeds have “Half the salt. All the flavor.”;

7. That Giants recover actual monetary damages incurred, in an amount to be established at trial, from Defendants’ false or misleading claim that Wild Dutchman sunflower seeds have “Half the salt. All the flavor.”;

8. That Giants recover the costs of this lawsuit and prejudgment and post-judgment interest;

9. That Giants recover enhanced damages because of Defendants' willful conduct;

10. That this case be found exceptional and Giants be awarded its reasonable attorneys' fees; and

11. That such further relief as the Court deems just and proper be awarded.

### **DEMAND FOR JURY TRIAL**

Plaintiff demands a trial by jury of all issues so triable by right under Rule 38 of the Federal Rules of Civil Procedure.

Dated: November 8, 2017

s/Katherine A. Moerke

**STINSON LEONARD STREET LLP**

Katherine A. Moerke (admitted)

(MN # 0312277)

Joel D. Leviton (admitted)

(MN # 0308687)

50 South Sixth Street, Suite 2600

Minneapolis, MN 55402

Telephone: 612-335-1500

Emails: [katie.moerke@stinson.com](mailto:katie.moerke@stinson.com)

[joel.leviton@stinson.com](mailto:joel.leviton@stinson.com)

Robin Wade Forward (admitted)

(ND # 05324)

811 East Interstate Avenue

Bismarck, ND 58503

Telephone: 701-221-8603

Email: [rob.forward@stinson.com](mailto:rob.forward@stinson.com)

Donna P. Gonzales (admitted)  
(CO # 45224)  
6400 S. Fiddlers Green Circle, Suite 1900  
Greenwood Village, CO 80111  
Telephone: 303-376-8400  
Email: [donna.gonzales@stinson.com](mailto:donna.gonzales@stinson.com)

*Attorneys for Plaintiff Giant Snacks, Inc.*